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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

STATE OF GEORGIA,

Petitioner,

v.

ROBERT W. ROPER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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QUESTIONS PRESENTED

I.

Should this Court grant certiorari to resolve the conflict among the Supreme Court of Georgia and the United States Courts of Appeals for the Fifth and Eleventh Circuits regarding whether the rule of *Edwards v. Arizona*, 451 U.S. 477 (1981), may be satisfied by the opportunity to or actual consultation with counsel to permit subsequent initiation of contact by authorities?

II.

Has the decision of the Supreme Court of Georgia erroneously created a Fifth Amendment right to counsel contiguous and coextensive with the Sixth Amendment right to counsel?

III.

Does the decision of the Supreme Court of Georgia directly contravene principles of extradition and the attachment of the Sixth Amendment right to counsel?

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STATE OF GEORGIA,

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v.

ROBERT W. ROPER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

The Petitioner, the State of Georgia, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia entered on February 2, 1989, and the subsequent denial of the motion for rehearing on February 23, 1989.

OPINIONS BELOW

The Supreme Court of Georgia reversed three convictions and three life sentences of Robert Roper in an opinion dated February 2, 1989. *Roper v. State,* 258 Ga. 847 ___ S.E.2d ___ (1989). (Appendix A). On February 23,

1989, the state appellate court denied the state's motion for rehearing. (Appendix B).

JURISDICTION

Judgment of the Supreme Court of Georgia was entered on February 2, 1989, and rehearing denied February 23, 1989. This Court's jurisdiction to consider the instant petition for a writ of certiorari from a state criminal direct appeal is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS

Fifth Amendment, United States Constitution:

> "[N]or shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ."

Sixth Amendment, United States Constitution:

> "[A]nd to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

Respondent, Robert W. Roper, was indicted by the Chatham County, grand jury, on July 16, 1986, for the offenses of murder, armed robbery, kidnapping and robbery by sudden snatching which occurred on June 23 and 25, 1986. Pursuant to a trial by jury, Respondent was convicted on all four counts on September 15, 1987. Respondent was sentenced to three life sentences for the

murder, armed robbery and kidnapping charges while receiving ten years imprisonment for the robbery by sudden snatching.

On direct appeal, the Supreme Court of Georgia found that a confession introduced against Respondent was obtained in violation of the rules of *Edwards v. Arizona*, 451 U.S. 477 (1981), and of *Michigan v. Jackson*, 475 U.S. 625 (1986), and reversed the convictions for murder, armed robbery and kidnapping. The robbery by sudden snatching conviction was affirmed. *Roper v. State*, 258 Ga. 847, ___ S.E.2d ___ (1989). The state's motion for rehearing was denied on February 23, 1989.

Petitioner subsequently filed a motion to stay the remittitur in the Supreme Court of Georgia to allow sufficient time to file the instant petition. The motion was granted. This petition follows.

STATEMENT OF FACTS

Petitioner relies upon the statement of facts as set forth in the opinion of the Supreme Court of Georgia. (Appendix A). Pertinent facts for this Court's consideration are that the crimes occurred on June 23 and 25, 1986, as set forth in the indictment. (Record 3-10). Savannah, Georgia, police learned that Respondent's co-defendant had relatives in New Jersey so that Georgia officials telephoned Somerset County, New Jersey, officials and placed a lookout for Respondent and the co-defendant, who were in the victim's stolen car. (9/3-16/87 Pre-trial Motions Transcript, pp. 22-23, 27-29, 46-49, 50-52, 55) (hereinafter designated 9/87 MT.). New Jersey officials

put out a flyer on the two men and received a teletype on the National Crime and Information Center computer. *Id.* at 50-52, 55. A New Jersey detective stopped the car pursuant to the lookout and arrested Respondent and the co-defendant on June 26, 1986. *Id.* at 57-59, 65, 68-69. A New Jersey detective telephoned Savannah police to advise them of the arrest. *Id.* at 97-98.

New Jersey officials twice interviewed Respondent, once on June 26, and once on June 27; each time, Respondent was advised of his constitutional rights, executed a waiver form and gave a statement. *Id.* at 100-101, 110-12, 119. On June 27, Respondent filled out a standard form, provided by the local public defender's office, on which Respondent indicated he wanted counsel. *Id.* at 130-31. The form was filled out pursuant to the fugitive from justice complaint. *Id.* at 138.

A New Jersey Assistant Public Defender met with Respondent on June 27, prior to the 1:30 p.m. court calendar, and conferred with Respondent concerning extradition. *Id.* at 130, 141. The public defender explained to Respondent what extradition was, what his rights were under extradition, and asked whether Respondent wished to waive extradition. *Id.* at 141. Respondent indicated he did. Counsel then advised Respondent again of his rights and gave Respondent the standard admonitions the public defender normally gave clients, telling Respondent to keep his mouth shut and, particularly since Respondent was waiving extradition, told Respondent not to speak to anyone until Respondent got to Georgia and could speak with the attorney who would be appointed for him. *Id.* at 141. Counsel then waived extradition.

At approximately 8:45 p.m. on June 27, Savannah, Georgia, Detective Ragan, accompanied by New Jersey detective Shedden, interviewed Respondent. *Id.* at 75-76, 83, 85, 119. Prior to the interview, Respondent was specifically asked whether he had counsel, and Respondent replied no. *Id.* at 169, 182. After being advised of his rights and executing a written waiver form, Respondent gave a third statement to officials. In this statement, Respondent admitted he and his co-defendant had planned to kill the victim and that Respondent shot the victim execution style while the victim cried and begged for his life.

Respondent was subsequently returned to Georgia. Georgia counsel was appointed for Respondent on July 9, 1986. (Record 11). Respondent was indicted on July 16, 1986. (Record 3-10).

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT OF WHETHER THE *EDWARDS* RULE MAY BE SATISFIED TO PERMIT SUBSEQUENT INITIATION OF CONTACT BY AUTHORITIES.

Petitioner submits this Court should grant the instant petition for a writ of certiorari to resolve the conflict between the Supreme Court of Georgia and the United States Courts of Appeals for the Fifth and Eleventh Circuits regarding whether the rule of *Edwards* may ever be satisfied and permit police to thereafter initiate contact. The Eleventh Circuit has held that a break in custody, arguably giving the accused an opportunity to consult

with counsel, satisfies the *Edwards* rule to permit interrogation by police upon the accused's subsequent arrest. The Fifth Circuit held that where an accused's limited request for specific counsel has been honored and consultation with that attorney has occurred, *Edwards* does not bar subsequent initiation of contact by police. The Supreme Court of Georgia, however, has held that the invocation of the right to counsel in the Fifth Amendment setting creates an *Edwards* "presumption" which never dissipates and, even after consultation with counsel, never dissolves.

In *Edwards v. Arizona*, 451 U.S. 477 (1981), this Court promulgated a rigid prophylactic rule regarding an accused's waiver of his Fifth Amendment rights after he has requested counsel. An accused "having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him . . . ." *Edwards*, 451 U.S. at 484-85.

In this case, Respondent never specifically invoked his right to counsel during the two custodial interrogations by New Jersey authorities. Instead, Respondent filled out a standard form requesting the assistance of the local public defender, a form which was directly forwarded to the public defender's office. (9/87 MT 133). New Jersey authorities did not even keep copies of these requests. *Id.* The New Jersey courts have held this form is not a request for counsel for custodial interrogation. *New Jersey v. Larry*, 211 N.J. Super. 221, 511 A.2d 704 (1986). *See* Appendix D.

Pretermitting the question of whether filling out this form constituted a request for counsel, the conflict presented to this Court is whether the opportunity to or actual consultation with counsel satisfies a request for counsel under *Edwards* and allows authorities thereafter to initiate contact with an accused. This precise issue has not been resolved by this Court.

In *Dunkins v. Thigpen*, 854 F.2d 394 (11th Cir. 1988), the Eleventh Circuit held that a break in custody "dissolves a defendant's *Edwards* claim." "If the police release the defendant, and if the defendant has a reasonable opportunity to contact his attorney, then we see no reason why *Edwards* should bar the admission of any subsequent statements." *Dunkins*, 854 F.2d at 397. There was no contention that the accused ever in fact consulted with counsel. Rather, the break in custody gave rise to the fiction that the accused had ample opportunity to consult with counsel so that *Edwards* did not bar interrogation by police when the accused was again taken into custody.

In *Griffin v. Lynaugh*, 823 F.2d 856, 862-63 (5th Cir. 1987), the defendant made a request for his attorney during interrogation. Police left the room while the accused telephoned the attorney. When police returned, the accused stated that this attorney had declined to represent the accused. Police asked if the accused wished to contact another lawyer, and the accused responded he did not want to talk to any other lawyer then. *Griffin*, 823 F.2d at 859. The accused was re-advised of the *Miranda* warnings and subsequently confessed to a murder. The Fifth Circuit construed this scenario as a limited request for counsel which was honored and satisfied. The Fifth

Circuit concluded, "[W]hen an accused makes an unambiguous but limited request for counsel, in the absence of police interference with the accused's fifth amendment guarantee to counsel, interrogation may proceed after satisfaction of that request." *Griffin*, 823 F.2d at 864.

Here, Respondent actually consulted with an attorney. Counsel warned Respondent of the dangers of talking to Georgia officials and told his client not to give a statement until after Respondent had consulted with Georgia lawyers upon his return to that state. The Georgia Supreme Court, however, found this consultation was insufficient to satisfy *Edwards*. The Court held as follows:

> *Edwards* presumes that after an accused invokes the right to counsel, any subsequent waiver made at a police-initiated interrogation and in the absence of counsel is necessarily the "product of the inherently compelling pressures" of custodial interrogation. [*Miranda v. Arizona*] 384 U.S. at 467. Under the rule enunciated in *Edwards*, reinterrogation without counsel present may occur only if the accused himself initiates further communication, exchanges or conversations with the police. *Id.* We cannot agree with the state that any opportunity to speak with counsel, no matter how brief, dissolves the *Edwards* presumption. If this were the rule, the police could begin a new round of questioning and attempt to obtain a waiver of the right to counsel each time the attorney leaves. Such a rule would do nothing to safeguard the right of an accused to be free from uncounseled interrogation. In sum, we conclude that the "bright-line" rule of *Edwards* requires that counsel be present during police-initiated interrogations after an accused has invoked the right to counsel.

Roper, 258 Ga. at 851. (Appendix A).

Petitioner urges this Court to grant certiorari to resolve the conflict on this important issue. This Court has consistently held that the Fifth Amendment privilege belongs to the accused and may be invoked only by him. After the accused has in fact consulted with counsel, Petitioner submits there is no overreaching by police when they contact the accused to ascertain whether he is willing at that point to give a statement. *Edwards* presupposed that the accused had no opportunity to consult with counsel prior to reinterrogation by police. Petitioner would urge this Court to grant certiorari to decide what happens when an accused has consulted with an attorney.

II. THE DECISION OF THE GEORGIA SUPREME COURT DIRECTLY CONFLICTS WITH *MICHIGAN V. DORAN*, 432 U.S. 282 (1978), AND *MICHIGAN V. JACKSON*, 475 U.S. 625 (1986).

This Court has consistently held that extradition is a summary executive proceeding whose purpose is to secure the return of an individual from the asylum state to the demanding state where any criminal proceedings may then commence. *Michigan v. Doran*, 439 U.S. at 289. "The [Extradition] Clause never contemplated that the asylum state was to conduct the kind of preliminary inquiry traditionally intervening between the initial arrest and trial." *Id.*

In *Michigan v. Jackson*, this Court extended the bright-line rule of *Edwards* to the Sixth Amendment setting. In *Michigan* this Court recognized the distinction between Fifth and Sixth Amendment requests for counsel, noting that the Fifth Amendment provided the accused a right to counsel in custodial settings while the Sixth Amendment

attachment represented the initiation of formal adversarial legal proceedings by way of formal charge, preliminary hearing, indictment, information or arraignment.

Here, the state appellate court found that initiation of interrogation by police, after Respondent had requested counsel while awaiting extradition, violated *Michigan v. Jackson*. Petitioner submits that this decision conflicts with both *Michigan v. Doran* and *Michigan v. Jackson*.

This Court held in *Michigan v. Jackson* that requests for counsel are to be given a broad interpretation. This standard of broad interpretation applies even to requests for counsel under *Edwards* in the Fifth Amendment setting. *Connecticut v. Barrett*, ___ U.S. ___, 107 S.Ct. at 828, 832 (1987).

Here, the state appellate court applied *Michigan v. Jackson* in assessing the request for counsel. However, the state court then misconstrued *Michigan v. Jackson* by concluding that the Sixth Amendment implicitly attached so that *Michigan* also barred subsequent initiation of contact by Georgia authorities. This decision impermissibly blurs the distinctions between Fifth and Sixth Amendment "rights" to counsel. The state appellate court in this case has unwittingly created a Fifth Amendment right to counsel which is coextensive and contiguous with the Sixth Amendment while ignoring the summary nature of extradition. Petitioner prays that this Court grant certiorari to consider the erroneous application of *Michigan v. Jackson* to these facts.

CONCLUSION

For all of the above and foregoing reasons, Petitioner prays that this Court grant a writ of certiorari to review the decision of the Supreme Court of Georgia.

Respectfully submitted,

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APPENDIX A

46269. ROPER v. THE STATE.

CLARKE, Presiding Justice.

Robert W. Roper was convicted of murder, armed robbery, kidnapping and robbery by sudden snatching. He received three life sentences on the murder, armed robbery and kidnapping charges and ten years imprisonment on the robbery by sudden snatching charge. He now appeals.[1] Because a confession introduced against him at trial was obtained in violation of the rule of *Edwards v. Arizona*, 451 U. S. 477 (101 SC 1880, 68 LE2d 378) (1981), and *Michigan v. Jackson*, 475 U. S. 625 (106 SC 1404, 89 LE2d 631) (1986), we reverse in part and affirm in part.

The facts relevant to our decision are as follows: On June 23, 1986, seventeen-year-old Kevin Lamar Jackson drove his blue Honda to a public library to complete his homework assignments. Three days later his body was discovered in the East Park Avenue area of Savannah, Georgia. He had been shot in the head. A few hours following the discovery of the body, Robert Roper and Christopher Burrell were seen in New Jersey in a blue

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[1] The crimes were committed on June 23, and 25, 1986. The defendant was indicted on July 16, 1986. A Chatham County jury returned a verdict of guilty on September 15, 1987. A motion for new trial was made on October 14, 1987 and was denied on March 7, 1988. A second motion for new trial was filed on June 7, 1988 and denied on June 21, 1988. Notice of appeal was filed on July 19, 1988. The transcript was docketed on October 5, 1988. The case was docketed on October 5, 1988, and was submitted for decision without oral argument on November 18, 1988.

Honda with a Georgia license tag. They were stopped, placed under arrest, and taken to the Franklin Township Police Department where they were confined in separate cells.

Detective Shedden of the Franklin Township Police interrogated Roper three times during his first 21 hours of incarceration. Each time Detective Shedden covered the same ground twice – once off the record and once with a tape recorder running. Each time Roper was advised of his constitutional rights. Each time Roper agreed to make a statement and to sign a waiver of his rights to remain silent and to have an attorney present during questioning.

The first interrogation took place at 11:55 p.m. on June 26. Roper claimed that he, Burrell and Jackson had engaged in a struggle and that he was not sure whether he or Burrell had shot Jackson. He admitted, however, that he had snatched a purse from a woman in a McDonalds restaurant on June 25 to get the money for the trip to New Jersey.

Roper was interrogated again at 11:10 a.m. on June 27. This time he stated that he had shot Jackson in self defense. Again, he admitted to the purse snatching incident.

At about noon on June 27, an investigator for the bail unit visited the jail to determine whether any of the inmates wanted an attorney. Roper filled out and signed a form requesting the assistance of a public defender. Neil Hamilton, a public defender, received the form and appeared in court that afternoon to represent Roper at an

extradition hearing. After a brief discussion with Hamilton, Roper waived extradition. Hamilton did not discuss the murder or kidnapping charges with Roper. He met with him only in the courtroom. Before Roper was returned to his cell he gave Roper his "standard speech," advising Roper to keep his mouth shut until he arrived in Georgia and could speak to another attorney.

At about 4:00 p.m. on the same day, Detective Ragan from Savannah arrived in New Jersey. He went with Detective Shedden to the county jail where Roper was now being held. At about 9:00 p.m. Roper was again interviewed. This time he admitted that he and Burrell planned to kill Jackson. Roper admitted that he had shot Jackson execution style while Jackson was crying and begging for his life.

At trial Roper moved to suppress the third statement. The trial court denied the motion, finding that Roper made each statement knowingly and voluntarily after being fully informed of his constitutional rights.

1. Roper asserts that the trial court erred in denying his motion to suppress the third confession. We agree. Under the rule of *Edwards v. Arizona*, supra, and *Michigan v. Jackson*, supra, once an accused in custody invokes the right to counsel, he should not be subject to further interrogation by the authorities until counsel is present, unless the accused himself initiates further communication, exchanges or conversations with the police. *Edwards*, 451 U. S. at 484-85. If police initiate questioning after the invocation of the right to counsel, any uncounseled waiver of that right is invalid. *Jackson*, 475 U. S. at 635.

In this case the State concedes that the form that Roper filled out requesting an attorney was a sufficient invocation of the right to counsel.[2] The State also concedes that the interview that resulted in the third confession was police-initiated and took place while Roper had been in continuous police custody. The State argues, however, that the "bright-line" rule of *Edwards* does not apply here because (a) the police officers interrogating Roper did not know that an attorney had been appointed for Roper; (b) Roper invoked the right to counsel only for the limited purpose of representing him at the extradition hearing; and (c) Roper was given an opportunity to consult with counsel prior to the third interview but chose to make a statement in his absence. We will address each argument briefly below.

(a) The state asserts that this case is distinguished from *Edwards* and because the officers interrogating Roper, unlike the police involved in those cases, were unaware that he had invoked his right to counsel. Moreover, when asked whether he was represented by counsel, Roper answered "No."

These facts may indicate that the officers were not guilty of any intentional misconduct. However, "*Edwards* focuses on the mind of the suspect and not of the police . . . " *Arizona v. Roberson*, 486 U. S. ___ (108 SC

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[2] We note that the sixth amendment right to counsel does not depend on a request for counsel. *Brewer v. Williams*, 430 U. S. 387 (97 SC 1232, 51 LE2d 424) (1977). A request for counsel, however, has been deemed "an extremely important fact in considering the validity of a subsequent waiver in response to police-initiated interrogation." *Jackson*, 475 U. S. at n.6.

2093) (1988). The U. S. Supreme Court imposed upon law enforcement authorities the duty to maintain a procedure to enable an officer who proposes to initiate an interrogation to determine whether a suspect has previously invoked the right to counsel. Id. at ___. Moreover, Sixth Amendment principles require imputation of the State's knowledge from one state actor to another. *Michigan*, 475 U. S. at 634. "One set of state actors (the police) may not claim ignorance of defendants' unequivocal request for counsel to another state actor (the court)." Id. The fact that the interrogating officers had no actual knowledge that Roper had made a request for counsel is constitutionally insignificant. *Roberson*, 486 U. S. at ___. Roper's negative answer to the question of whether he had a lawyer did not answer the question of whether he had invoked the right to counsel, nor could it constitute a waiver.

(b) Next, the state contends that Roper's invocation of his right to counsel was a limited invocation of that right, an invocation of the right to have counsel to represent him at formal court proceedings. The state asserts that under *Collins v. Francis*, 728 F2d 1322 (11th Cir. 1984), a limited request for counsel is not sufficient to invoke the *Edwards* rule.

In *Jackson*, 475 U. S. at 633, the state made a similar argument. There the suspect had requested counsel at an arraignment. The state maintained that the suspect may not have intended the request for counsel to encompass representation during further questioning and urged the court not to apply the *Edwards* rule. The court rejected the state's argument stating, "Th[e] settled approach to questions of waiver requires us to give a broad rather than a

narrow interpretation to a defendant's right to counsel – we presume that the defendant requests the lawyer's services at every critical stage of the prosecution." 475 U. S. at 633.

A defendant may, by his own language, limit his request for counsel to certain settings. *Connecticut v. Barrett*, 479 U. S. 523 (107 SC 828, 93 LE2d 920) (1987). Here, however, there is no evidence that Roper wished to limit his request for counsel in any way. To the contrary, he filled out a form simply indicating that he was indigent and wanted a lawyer appointed to represent him. Compare *Ross v. State*, 254 Ga. 22 (326 SE2d 194), cert. denied, 472 U. S. 1022 (105 SC 3490) (1985) (defendant expressed desire to be represented by counsel at only committal hearing); *Berry v. State*, 254 Ga. 101 (326 SE2d 748) (1985) (request for counsel to be present only during polygraph testing); *Coleman v. State*, 179 Ga. App. 834 (348 SE2d 70), aff'd in part and reversed in part, 257 Ga. 313 (357 SE2d 566) (1987) (defendant requested counsel to be present during tape recorded statements). This case is distinguished from *Krier v. State*, 249 Ga. 80 (287 SE2d 531), cert. denied, 457 U. S. 1140 (102 SC 2974) (1982), where an attorney was appointed to represent the accused during an extradition hearing even though the accused had not made a request for counsel that would invoke the *Edwards* rule. Thus, in the absence of any evidence that Roper's request for counsel was limited by its terms, we must presume that he wanted counsel at all critical stages, including custodial interrogation.

(c) The state next argues that there was no violation of Roper's right to counsel because Roper was allowed to consult with an attorney that afternoon. The state asserts

that the officers complied with the requirement of *Edwards* that no interrogation take place until counsel "has been made available."

The *Edwards* rule is the corollary to the *Miranda* admonition that "if the individual states that he wants an attorney, the interrogation must cease until an attorney is present." 384 U. S. at 474. The Fifth and Sixth Amendments protect not only the right to consult with an attorney, but also the right to have the attorney present during questioning. See, e.g., *Brewer v. Williams*, 430 U. S. 387 (97 SC 1232, 51 LE2d 424) (1977) (Sixth Amendment violated when police interrogated a suspect while transporting him, even though he had consulted an attorney shortly before entering the car.) *Edwards* concluded that it is inconsistent with *Miranda* to reinterrogate an accused in custody if he has clearly asserted his right to counsel. 451 U. S. at 485. *Edwards* presumes that after an accused invokes the right to counsel, any subsequent waiver made at a police-initiated interrogation and in the absence of counsel is necessarily the "product of the inherently compelling pressures" of custodial interrogation. 384 U. S. at 467. Under the rule enunciated in *Edwards*, reinterrogation without counsel present may occur only if the accused himself initiates further communication, exchanges or conversations with the police. Id. We cannot agree with the state that any opportunity to speak with counsel, no matter how brief, dissolves the *Edwards* presumption. If this were the rule, the police could begin a new round of questioning and attempt to obtain a waiver of the right to counsel each time the attorney leaves. Such a rule would do nothing to safeguard the right of an accused to be free from uncounseled

interrogation. In sum, we conclude that the "bright-line" rule of *Edwards* requires that counsel be present during police-initiated interrogations after an accused has invoked the right to counsel.

Thus, we conclude that Roper's waiver of his right to counsel, made at a police-initiated interrogation after he had invoked his right to counsel, was invalid. The admission of the statement that he made during that interrogation was error.

Having found constitutional error, we must next determine whether that error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U. S. 18 (87 SC 824, 17 LE2d 705) (1967). Having reviewed the record thoroughly, we cannot say that the admission of the third confession did not contribute to the jury's verdict of guilty on the murder, kidnapping and armed robbery charges. The information regarding these offenses elicited during the third confession was more consistent with the physical evidence and with logic than was the information held in the first two confessions. Also, it was during this confession that Roper stated that he shot Jackson in the back of the head while Jackson was kneeling and crying. It is also notable that the prosecutor relied heavily on the third confession in making his closing argument to the jury.

On the other hand, the third confession did not contain any new information relating to the purse snatching charge. Roper admitted to all of the pertinent facts of that charge during the first two interrogations. There was also eyewitness testimony regarding his involvement in that

crime. Thus, although the introduction of the third statement was not harmless error as to the murder, armed robbery, and kidnapping charges, it was harmless as to the purse snatching charge.

2. In his next enumeration of error, Roper asserts that it was an abuse of discretion to join the trial of the purse snatching charge with the other more serious charges. He contends that it was error to join the trial of offenses that were not based on the same conduct and did not constitute a series of acts connected together. Roper neglects to note, however, that the trial of offenses may be joined when the acts constitute parts of a single scheme or plan. *Dingler v. State*, 233 Ga. 462 (211 SE2d 752) (1975). The state's theory of this case was that Roper and Burrell stole the car, murdered Jackson and snatched the purse, all as part of their plan to go to New Jersey. We find no abuse of discretion in the joinder of the offenses. Moreover, even if it were an abuse of discretion, Roper could not have been prejudiced by the joinder given the overwhelming evidence against him on the purse snatching charge.

3. Roper next asserts that the admission of certain photographs of Jackson's body was error because changes in the condition of the body had taken place due to exposure to the elements. We have held that it is error to admit photographs that portray damage to the victim's body that was not caused by the assailant, *Brown v. State*, 250 Ga. 862 (302 SE2d 347) (1983); *Heard v. State*, 257 Ga. 1 (354 SE2d 115) (1987). Here, however, the damage inflicted by the elements during the two days prior to the discovery of Jackson's body was minimal. The presence of one fly and many insect bites on the body is not

sufficient to divert the jury from their task of sorting out the facts of the case. We find no error in the admission of the photographs.

4. Finally, Roper contends that the admission of certain testimony regarding Jackson's character was error. We find no error. The identity and general background of the victim are relevant issues in a murder trial. *Ingram v. State*, 253 Ga. 622 (323 SE2d 801) (1984). The testimony complained of can be described as "general background" information.

In conclusion, we reverse the conviction on the murder, armed robbery and kidnapping charges. The conviction on the robbery by sudden snatching charge is affirmed.

Affirmed in part and reversed in part. All the Justices concur.

DECIDED FEBRUARY 2, 1989 –
RECONSIDERATIONS DENIED FEBRUARY 23, 1989.

Murder, etc. Chatham Superior Court. Before Judge Head.

Kenneth Kondritzer, for appellant.

Spencer Lawton, Jr., District Attorney, Gregory M. McConnell, David T. Lock, Assistant District Attorneys, Michael J. Bowers, Attorney General, Andrew S. Ree, Assistant Attorney General, for appellee.

APPENDIX B

Clerk's Office, Supreme Court of Georgia

ATLANTA FEB 23 1989

The motion for a rehearing was denied today:

Case No. 46269, Roper v. The State

Yours very truly,
MRS. JOLINE B. WILLIAMS, Clerk

APPENDIX C

SUPREME COURT OF GEORGIA

ATLANTA, February 23, 1989

The Honorable Supreme Court met pursuant to adjournment.

BY: Clarke, P.J.

The following direction was given:

ROBERT W. ROPER V. THE STATE

Upon consideration of the motion for a stay of this court's remittitur in order that an appeal or an application for certiorari may be filed in the Supreme Court of the United States to obtain a review of this court's judgment rendered in this case on 2-23-89 such motion is hereby granted, subject to the following conditions:

(1) The clerk of this court is directed to withhold the transmittal of such remittitur to the trial court for ninety days from the date of this court's judgment.

(2) The clerk of this court is directed to transmit such remittitur to the trial court not later than the ninety-fifth day from the date of this court's judgment, provided that the clerk shall continue to withhold the transmittal of such remittitur if the clerk is notified in writing that an appeal or application for certiorari has been timely filed in the Supreme Court of the United States. Upon the timely filing of such appeal or application in the Supreme Court of the United States, the clerk is directed to

withhold the transmittal of such remittitur until the final disposition of the case by that court.

/s/ Harold G. Clarke
Presiding Justice Harold G. Clarke

APPENDIX D

DEFENDANT'S
EXHIBIT

SOMERSET COUNTY SUPERIOR COURT

LAW DIVISION AGS
8-31-87 #1

PUBLIC DEFENDER APPLICATION (FORM 5A)

NAME (Please Print) Robert W. Roper

CHARGES Fug Ga INDICTMENT/COMPLAINT #___

HAVE YOU EVER BEFORE BEEN KNOWN, ARRESTED UNDER OR USED ANY OTHER NAME? SPECIFY___

ADDRESS 748 East Tuffy St. APT./FLOOR___PHONE 912-232-0821

Savannah GA JAIL * BAIL (amt. posted)___

HEIGHT 56" WEIGHT 120 RACE W SEX M

DATE OF BIRTH 3/27/65 PLACE OF BIRTH Savannah SOCIAL SECURITY #254-35-8865

ARE YOU PRESENTLY ON PROBATION? NO OR PAROLE? YES (Specify)

MARRIED NO SPOUSE'S NAME NO NUMBER OF CHILDREN None

ARRESTING AGENCY Franklin WHERE ARRESTED Franklin DATE OF ARREST 6/27/86

NAMES OF PERSONS ARRESTED WITH YOU Christopher Burrell

DO YOU HAVE ANY OTHER PENDING CHARGES IN ANY JURISDICTION? (Specify) GA.

PRESENT EMPLOYER OR LAST EMPLOYER (Name & Address) NO

MONTHLY EMPLOYMENT EARNINGS___DO YOU RECEIVE CHILD SUPPORT?___OR ALIMONY?___

IS CHILD SUPPORT BY COURT ORDER?___AMOUNT OF SUPPORT OR ALIMONY___

IS SPOUSE AND/OR CHILDREN EMPLOYED?___ WHERE___

SALARY___

OTHER INCOME (Welfare, Soc. Sec., VA, Unemp. Ins., Disability, Work Comp., Stocks, Bonds, etc.

Specify Type & Value: NO

DO YOU OWN PERSONAL PROPERTY (Auto, jewelry, furs, motorcycles, trucks, etc.) Specify type & value: None

DO YOU OWN A HOUSE OR LAND? None DO YOU RENT___

ADDRESS___VALUE (if you own)___MONTHLY RENT OR MORT___

MAJOR DEBTS, LOANS, BILLS None

NAME(S) OF BANKS WHERE YOU HAVE ACCOUNT(S): None

AMOUNT___CASH ON HAND___

HAVE YOU EVER BEFORE BEEN REPRESENTED BY AN ATTORNEY? Yes IF SO NAME Private (sic)

DATE___

018-00607-86

CERTIFICATION R. 1:4-4(b)

I CERTIFY THAT THE FOREGOING STATEMENTS MADE BY ME ARE TRUE. I AM AWARE THAT-IF ANY

OF THE FOREGOING STATEMENTS MADE BY ME ARE WILFULLY FALSE, I AM SUBJECT TO PUNISHMENT.

6/27/86
DATE

/s/ Robert W. Roper
DEFENDANT

Supreme
FILED
SEP
JOSEPH

No. 88-1956

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1988

STATE OF GEORGIA,

Petitioner,

v.

ROBERT W. ROPER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

Kenneth Kondritzer
306 West State Street
Savannah, Georgia 31401
(912) 234-0707

Counsel of Record
for Respondent

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STATEMENT OF FACTS

In lieu of a complete statement of facts, Respondent submits the following corrections of inaccuracies and omissions in the Statement of Facts and in the Reasons for Granting the Writ contained in the Petition for a Writ of Certiorari (hereinafter "Petition"):

Petitioner, on page 3 of the Petition, declares its reliance upon the facts as set forth by the Supreme Court of Georgia in Roper v. State, 258 Ga. 847, 375 S.E.2d 600 (1989). In that Court, the Petitioner conceded that Respondent invoked his right to counsel by completing a form requesting an attorney. Id. at 849. Yet on page 6 of the Petition, the Petitioner now asserts that the form filled out by Respondent did not constitute a sufficient request for counsel. The form indicated that Respondent wanted an attorney to represent him, and no evidence was presented that he limited in any manner his request for counsel. Id. at 850.

Although it is correct that the form in question was provided by the public defender's office (Petition 4), it should not be omitted that the person who supplied Respondent with the form was a special deputy clerk of court performing a service through and for the judiciary. (9/3-16/87 Pre-trial Motions Transcript, pp. 130, 135-136, 138) (hereinafter designated 9/87 MT). It was standard procedure for this individual to instruct an inmate to fill out the form if he desired an attorney. (9/87 MT 135). The form was not specific as to the attorney's purpose. Id. at 137. And the information in the form was provided to the arraigning judge as well as to the public defender's office. Id. at 136.

The extent of Respondent's consultation with an attorney consisted of a meeting in the courtroom whereby a public defender engaged in a brief conversation with Respondent concerning a waiver of extradition. Roper, 258 Ga. at 848. The substantive charges were not discussed other than the public defender advising Respondent to keep his mouth shut. Id. at 848-849.

The application completed by Respondent requesting an attorney became a part of the jail records and was available to the police who interrogated Respondent subsequent to his request for an attorney. (9/87 MT 137). A county prosecutor was aware that Respondent had appeared in court, for the fugitive complaint, with a public defender. Id. at 143-144. Either that same prosecutor, or one other, met with the case detectives later that day, prior to the interrogation which resulted in the reversal of Respondent's convictions. Id. at 76-78.

At trial, a psychologist testified that he was 95 per cent confident that Respondent's I.Q. was somewhere between 68 and 78. (9/16/87 Sentencing Phase Transcript, p. 45). This meant that Respondent was borderline mentally retarded with a mental age of about twelve years. Id.

RESPONSE TO REASONS FOR GRANTING WRIT

I. NO CONFLICT EXISTS BETWEEN THE SUPREME COURT OF GEORGIA AND THE UNITED STATES COURTS OF APPEAL FOR THE FIFTH AND ELEVENTH CIRCUITS WITH REGARD TO THE SCOPE OF THE EDWARDS RULE.

Petitioner contends that a conflict exists between federal courts and the Supreme Court of Georgia as to when police may initiate interrogation following an invocation of the right to counsel and actual consultation with counsel. (Petition 5, 7). Petitioner cites Dunkins v. Thigpen, 854 F.2d 394 (11th Cir. 1988), and Griffin v. Lynaugh, 823 F.2d 856 (5th Cir. 1987), as allowing reinterrogation after an accused has consulted with counsel. Petitioner then requests that this Court resolve the conflict by deciding that police may interrogate an accused, who previously invoked his right to counsel, outside the presence of an attorney so long as a consultation occurred. (Petition 9). However, these cases are readily distinguishable and no such conflict in fact exists.

As a preliminary matter, Respondent never consulted with an attorney concerning the substantive charges. Roper, 258 Ga. at 848. His brief meeting in a courtroom with a public defender concerning extradition, not the substantive charges, cannot be considered a consultation in any meaningful or practical sense. As no consultation occurred, this is not an

appropriate case for deciding the ramifications of an attorney-client consultation on an accused who was continuously in custody.

Secondly, the cases cited by Petitioner deal with aspects of the rule of Edwards v. Arizona, 451 U.S. 477 (1981), that are different than those presented to the Georgia Supreme Court. Griffin concerns a limited request for counsel (which was fully honored) rather than an invocation of the general unlimited right to counsel. In contrast, the Georgia Supreme Court specifically noted the absence of any evidence that Respondent's request for counsel was limited. Roper, 258 Ga. at 851. No right-to-counsel violation occurred in Griffin because the police complied with the accused's limited request. Griffin, 823 F.2d at 857. The sole issue was the meaning to be given an unambiguous limited request for counsel. Id. at 862.

In Dunkins, where the accused asked to speak to either his attorney or his mother, the police did more than merely meet his request - they released him from custody entirely. Not surprisingly, the Eleventh Circuit held that the petitioner's freedom - not consultation with an attorney - rendered the protection of the Edwards rule unnecessary. Dunkins, 854 F.2d at 397. As Respondent was never released from custody, Dunkins does not apply to the case at hand.

Not only does Petitioner assert that there is a conflict between the Georgia Supreme Court and the federal courts, Petitioner also requests that this Court decide what happens when an accused has consulted with an attorney. (Petition 9). It is well settled that an invocation of the right to counsel requires the presence of an attorney during questioning. See, e.g., Edwards, 451 U.S. at 484. The Edwards rule came about as a corollary to the admonition in Miranda v. Arizona, 384 U.S. at 474, that "[i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present." Arizona v. Roberson, 486 U.S. ____, 108 S.Ct. 2093, 100 L.Ed.2d 704, 712 (1988).

Petitioner is advocating that the police now be allowed to interrogate an accused after he has met with an attorney, even though the accused has remained in custody and has expressed a desire to deal with the police only through counsel. Respondent asks this Court not to ignore the "inherently compelling pressures" of custodial interrogation which was the concern of Edwards, 451 U.S. at 485, and not to overturn Edwards.

II. NO CONFLICT EXISTS BETWEEN THE DECISION OF THE GEORGIA SUPREME COURT AND MICHIGAN V. JACKSON AND MICHIGAN V. DORAN

Previously, Petitioner conceded that Respondent invoked his right to counsel but argued that Respondent's invocation of the right was limited to formal court proceedings. Roper, 258 Ga. at 849-850. The Georgia Supreme Court, addressing this particular argument, noted the lack of evidence that Respondent wished to limit his request for counsel. Id. at 850. The Court cited Michigan v. Jackson, 475 U.S. at 633, which held that a request for counsel is to be given a broad interpretation. Id.

Petitioner now contends, for the first time, that the Edwards rule has no application whatsoever where an accused requests the assistance of counsel in an asylum state which is seeking to initiate extradition proceedings. (Petition 9-10). The rationale is that the Fifth Amendment right arises only in a custodial setting, and the Sixth Amendment right does not attach at an extradition hearing.

Respondent submits that, as this question was never raised in nor passed upon by the Georgia Supreme Court, as required by Supreme Court Rule 21.1 (h), it is inappropriate to grant a writ of certiorari on this ground.

Addressing the issue on the merits, Petitioner is incorrect in arguing, first of all, that no Sixth Amendment

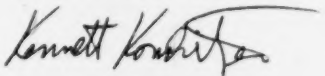
right to the assistance of counsel attaches prior to an extradition hearing due to the summary nature of extradition. The Uniform Criminal Extradition Act provides that one is entitled, in the asylum state, to be informed by a judge of a court of record of the right to the assistance of counsel as well as other rights, such as the right to contest the extradition by writ of habeas corpus. See, e.g., O.C.G.A. 17-13-30. The Fourth Amendment prohibits extradition without evidence that a fair and reliable probable cause determination has occurred in the demanding state. See, e.g., Batton v. Griffin, 240 Ga. 450, 241 S.E. 2d 201 (1978), citing Gerstein v. Pugh, 420 U.S. 103 (1975). The extradition procedure signals "the initiation of adversary judicial proceedings" and consequently the attachment of the Sixth Amendment. See Michigan v. Jackson, 475 U.S. at 629-630.

Additionally, in putting forth this argument, Petitioner is ignoring the directive of Michigan v. Jackson, 475 U.S. at 636, that the assertion of the right to counsel at arraignment "or similar proceeding" triggers the application of the Edwards rule.

CONCLUSION

For all of the reasons stated above, Respondent requests that this Petition for a Writ of Certiorari be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the within and foregoing Response To Petition For A Writ Of Certiorari upon all of the parties who are required to be served, prior to the time of filing, by depositing same in the United States Mail with adequate postage attached, in an envelope addressed to:

Paula K. Smith
Assistant Attorney General
132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334

KENNETH KONDRITZER
306 W. State Street
Savannah, GA 31401
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Counsel of Record
for Respondent

Sworn to and subscribed before me,
this 1st day of September, 1989.

Notary Public, State of Georgia

SUSIE B. KELLEY NOTARY PUBLIC EFFINGHAM CO., GA.